STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 12, 2005
v	No. 254628 Oakland Circuit Court
KEVIN WILLIAMS, Defendant-Appellant.	LC No. 03-192019-FH

Before: O'Connell, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals by right his conviction of assault with intent to do great bodily harm less than murder, MCL 750.84, and being a third habitual offender, MCL 769.11. Defendant also argues that the trial court erred by sentencing him to four consecutive 30-day jail terms for four separate instances of contempt of court. We affirm.

I. Summary of Facts and Proceedings

This case grows out of a confrontation between defendant and the victim. The victim testified he had three-year relationship with Shkeesha Adams that included living together for two years but not at the time of the incident when the two were only dating. Adams had two children by defendant from a prior relationship. According to the victim, defendant was unhappy that he was dating Adams.

The victim testified that on the day of the offense, he parked his car in the street and walked up a driveway to where Adams was sitting in a van with several children and Adams' friend, Ronlea Williams. While the victim talked to Adams, defendant arrived and parked his car behind the van. The victim testified he believed there would be a confrontation, so he started to walk to his car in the street when defendant beckoned him over; the two shook hands. According to the victim, defendant first stated that the two would not fight but then he threatened the victim. The victim continued toward his car in the street, and defendant came after him with a hammer. The victim testified that he backpedaled toward the street, but before he could call 911 on his cell phone, defendant struck him on the left side of his head with the claw-end of the hammer. The blow rendered the victim unconsciousness and bleeding in the street. When the victim regained partial consciousness, but not the ability to speak, Adams and Williams were

standing over him crying. The victim was hospitalized for a week, left with two scars on the left side of his head, and at the time of trial, still suffered from a speech impediment.

Ronlea Williams testified that her best friend was Adams, and that she was unrelated to defendant but a good friend of his. According to Williams, the victim and Adams were arguing when defendant parked his car behind the van she, Adams and the children occupied. Williams testified that defendant and the victim were talking near the victim's car in the street while she continued talking with Adams. According to Williams, the next thing she knew the victim was on the on the street so she called 911 and reported "[a] man in the street bleeding." Williams claimed that she was not upset or crying; she only wanted the police to come and take the victim away from her house. She denied telling Tanya White, the investigating police officer, that defendant struck the victim with a hammer.

Officer White testified that she was dispatched and arrived at the scene of the incident within three or four minutes. She found the victim sitting on the curb with his head bleeding; blood and what she believed to be human tissue were in the street. The victim was conscious and could speak but was confused and disoriented. White first spoke individually to Adams and then to Williams. To impeach Williams, White was permitted to testify that Williams told her that defendant struck the victim with a hammer and fled the scene.

The trial of this case commenced on November 25, 2003, and was adjourned because of Thanksgiving holiday to December 2, 2003. The trial court ordered all witnesses to return to court on the adjourned date. Adams was present in court on the first day of trial under subpoena and returned to court on December 2, 2003 but then absconded before being called as a witness. The prosecutor sought to admit Adams statement to White based on White's testimony that when she arrived, Adams was upset, crying and spoke in an escalated and elevated voice. Defense counsel objected on the basis of hearsay and lack of adequate foundation, but the trial court ruled that Adams statement to White would be admitted as an excited utterance under MRE 803(2).

Officer White testified that Adams told her the following: After defendant arrived, he and the victim engaged in a verbal confrontation. Then defendant reached into an open window of his car and pulled out a hammer with a claw-end. Adams stated that defendant struck the victim with the claw end of the hammer and then fled in his car.

Defendant testified in his own defense. He acknowledged that he shook hands with the victim but claimed that then the victim threatened him. Defendant testified that the victim ran to the front of his car in the middle of the street with a cell phone stating that he was calling for assistance from Detroit to have defendant killed. Defendant then went to the driver's door of the victim's car and the victim "started pacing back" toward nearby houses. Defendant testified he opened the door of the victim's car while the victim "was bouncing back and forth, like he was trying to get something [and defendant] was kinda trying to see what." According to defendant, the victim then ran toward him at the open car door and the two "got to fighting," which defendant described as "mutual" "[p]unching, kicking, doing, slamming, banging your head on the car, all of that." Defendant testified the fighting "just stopped," and he fled the scene because Williams was calling the police, and he "had a warrant." Defendant denied the victim was bleeding when he left. Asked how the victim sustained his injury, defendant responded: "We was physically you know like this with the car door, banging, we were going it all. It

wasn't no, be there later on the street who hit him, be there laid on the street." Defendant denied hitting the victim with a hammer but did not recall if he had any other type of weapon.

On cross-examination, defendant admitted he never saw the victim with a weapon. And, defendant acknowledged that he might have had a "sack of quarters" or brass knuckles for the purpose of self-defense. When asked rhetorically, "But you wouldn't use a hammer to assault anybody, correct?", defendant answered, "Maybe yes, if I had one on me, yes." Defendant also admitted that he was not afraid of the victim.

Defendant also presented witnesses who testified regarding alleged prior threats and altercations between the victim and defendant.

The jury was instructed on assault with intent to do great bodily harm, felonious assault, MCL 750.82, simple assault, MCL 750.81, and self-defense. The jury returned its verdict of guilty on both the main charge and felonious assault, which the prosecutor moved to dismiss to avoid double jeopardy concerns. Defendant admitted his prior felony convictions.

II. Analysis

A.

On appeal, defendant has abandoned his argument in the trial court that White's testimony regarding Adams' statement was inadmissible hearsay. Rather, defendant argues that admission of Adams' statement as substantive evidence violated his Sixth Amendment right to confront witnesses against him. The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Sixth Amendment's confrontation guarantee is applied to state prosecutions through the Fourteenth Amendment's Due Process Clause. *Id*., at 42; *Pointer v Texas*, 380 US 400, 406, 13 L Ed 2d 923, 85 S Ct 1065 (1965). Here, defendant argues that because Adams' statement was "testimonial" evidence, and he did not have a prior opportunity to cross-examine Adams, his confrontation rights were violated. "Where testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford, supra* at 68.

We review the trial court's decision to admit or exclude evidence for a clear abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the trial court's decision. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Preserved, nonconstitutional evidentiary error will merit reversal only if it involves a substantial right, and after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). We review de novo questions of law on which alleged evidentiary error is based. *Id*., at 488.

In this case, although defendant preserved a claim of error under MRE 803(2), he did not object below on the basis of the Confrontation Clause. Accordingly, he did not preserve for appeal his constitutional claim. MRE 103(a)(1); *People v Kilbourn*, 454 Mich 677, 684-685;

563 NW2d 669 (1997); *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). Our review is limited to plain, outcome-determinative error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Geno*, 261 Mich App 624, 630; 683 NW2d 687 (2004). Further, reversal is warranted only when the plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings, independent of defendant's guilt or innocence. *Carines, supra* at 774; *Coy, supra.*

Even though this case was tried before *Crawford* was decided, it nonetheless applies retrospectively because this case was pending on appeal when the Supreme Court decided that case. *People v Bell (On Second Remand)*, 264 Mich App 58, 62; 689 NW2d 732 (2004), citing *People v McPherson*, 263 Mich App 124, 135 n 10; 687 NW2d 370 (2004). This is so because "'a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.'" *Powell v Nevada*, 511 US 79, 84; 114 S Ct 1280; 128 L Ed 2d 1 (1994), quoting *Griffith v Kentucky*, 479 US 314, 328; 107 S Ct 708; 93 L Ed 2d 649 (1987).

In *Crawford*, the United States Supreme Court abandoned the reliability test established in *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980) with respect to the admissibility of "testimonial" evidence against a defendant. Under *Roberts*, the admission of an unavailable witness's statement against a criminal defendant did not violate the Confrontation Clause if the statement bore adequate indicia of reliability by either falling within a firmly rooted hearsay exception or because it possessed particularized guarantees of trustworthiness. But the *Crawford* Court held it must remain faithful to the original understanding of the Confrontation Clause: "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford, supra* at 59. Although the Court acknowledged dying declarations as a possible *sui generis* exception to its holding, *id*., at 56 n 6, when evidence is "testimonial," whether it satisfies a hearsay exception or is otherwise reliable is immaterial. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Id*. at 62.

Although the *Crawford* Court did not define "testimonial," it did observe:

> Various formulations of this core class of "testimonial" statements exist: *ex parte* in-court testimony or its functional equivalent, that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially[;] . . . extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[; and,] . . . statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. [*Crawford, supra* at 51-52 (citations and internal punctuation omitted).]

More important to the instant case, the *Crawford* Court opined:

> Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. Police interrogations bear a striking resemblance to examinations by justices of the peace in England. . . .
>
> That interrogators are police officers rather than magistrates does not change the picture either. Justices of the peace conducting examinations under the Marian statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function. England did not have a professional police force until the 19th century, so it is not surprising that other government officers performed the investigative functions now associated primarily with the police. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace. [*Crawford, supra* at 52-53 (citations omitted).]

Thus, although the Supreme Court left "for another day any effort to spell out a comprehensive definition of "testimonial," the Court left no doubt regarding police interrogations. *Id*., at 68. "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and *to police interrogations*. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id*., (emphasis added). See, also, *Bell, supra* at 62.

We conclude that Adams' statement is no less "testimonial" because it was taken within minutes of the event being investigated, or that the declarant was still under the sway of the startling event and thus presumptively reliable. See, e.g., *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), and *People v McLaughlin*, 258 Mich App 635, 659-660; 672 NW2d 870 (2003). *Crawford* explicitly rejects compliance with the rules of evidence or indicators of reliability as permitting admission of "testimonial" evidence. The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford, supra* at 61. We conclude that Adams' statement is "testimonial" because it was made in circumstances which would lead an objective witness reasonably to believe that her statements would be available for use at a later trial, i.e., made to a police officer in response to questioning during the course of an investigation. Because defendant did not have an opportunity to cross-examine Adams, and her out-of-court declarations were admitted to prove the truth of the matter asserted, we find that plain error occurred.

Although plain error occurred, we conclude that the error was not outcome determinative. The victim testified that defendant struck him in the head with the claw-end of a hammer. His testimony was corroborated by the serious injury he suffered, the scars he was left with, and by police testimony concerning his condition and description of the crime scene. Further, other than denying he used a hammer, defendant's own testimony largely agreed with that of the victim. The evidence, including his own testimony, did not support defendant's claim of self-defense. Accordingly, defendant has not met his burden of showing that the error affected the outcome of the trial and that he was prejudiced by it. *Carines, supra* at 763. Moreover, even if the error affected the outcome, we would not reverse because the record here does not establish defendant's innocence or that the error seriously affected the fairness, integrity or public reputation of judicial proceedings, independent of defendant's guilt or innocence. *Id*.

B.

At the sentencing proceeding, the trial court pronounced defendant's sentence to be 57 months to 20 years imprisonment with 82 days of jail credit. Defense counsel sought defendant's signature on an appeal form when the following colloquy occurred.

Counsel. Can Mr. Williams just sign the form before he's taken out, Your Honor.

Trial Court. Yes.

Defendant. Bullshit man. Bullshit.

Trial Court. Shut up, Mr. Williams, or you're gonna be held in contempt of Court.

Defendant. (Inaudible)

Trial Court. I find you here in contempt of Court.

Defendant. Man, you can't do nothing else. I mean, I got the 57 Months, are you gonna keep adding on?

Trial Court. I'm gonna add another thirty days to your jail sentence, right now.

Defendant. Keep addin, I don't give a ____ , keep addin.

Trial Court. Contempt of Court, twice, sixty days.

Defendant. Keep addin', I don't give a ____ .

Trial Court. Ninety days.

Defendant. Another year.

Trial Court. A hundred twenty days.

(Defendant leaves the courtroom with deputies.)

Trial Court. The Court hereby finds Mr. Williams in contempt of court[.] [H]ow many times did I do that?

Court Staff. 120, another four months.

Trial Court. Four times. . . .

Defendant subsequently moved to vacate his sentences for contempt. The trial court denied the motion, citing MCL 768.7a, and *In re Ward*, 295 Mich 742; 295 NW 483 (1940), as authority to impose the four consecutive thirty-day jail sentences for contempt of court.

On appeal, defendant does not contest the propriety of his contempt convictions or that pursuant to MCL 768.7a the trial court properly ordered one 30-day contempt sentence to be served consecutive to his sentence for the instant offense. Further, defendant does not contest that the colloquy above substantiates four separate instances of contempt of court. See MCL 600.1701(a).[1] Rather, defendant raises the narrow issue that the trial court lacked legal authority to order the four contempt sentences to be served consecutive to each other. Defendant argues that because no statutory authority supports consecutive sentencing in this situation, his contempt sentences in that regard are unlawful and must be amended to run concurrently with each other.

We review questions of law de novo, including issues of statutory construction. *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003); *People v Spann*, 250 Mich App 527, 529; 655 NW2d 251 (2002), modified 469 Mich 904; 668 NW2d 904 (2003). The goal of statutory construction is to give effect to the intent of the Legislature. *Id.*, at 530. The *Spann* Court stated the guidelines we follow in discerning the Legislature's intent:

> If a statute is clear, it must be enforced as plainly written. However, if a statute is susceptible to more than one interpretation, judicial construction is proper to determine legislative intent.
>
> Statutory language should be construed reasonably, keeping in mind the purpose of the act. When terms are not expressly defined by statute, a court may consult dictionary definitions. Words should be given their common, generally accepted meaning, if consistent with the legislative aim in enacting the statute. [*Id.*, (citations omitted).]

Further, we must liberally construe the Code of Criminal Procedure, and in particular, statutes providing for consecutive sentencing to effectuate their "intents and purposes." MCL 760.2; *People v Phillips*, 217 Mich App 489, 499; 552 NW2d 487 (1996). In general, the purpose of providing for consecutive sentencing is to deter the commission of particular classes of crimes by removing the security of concurrent sentencing. *Id.*

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[1] MCL 600.1701(a) provides:

> The supreme court, circuit courts, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> (a) Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings or impair the respect due to its authority.

Defendant relies on the long-standing judicial rule of construction in Michigan "that sentences are concurrent rather than consecutive in the absence of specific legislative authorization." *People v Wakeford*, 418 Mich 95, 136; 341 NW2d 68 (1983); *Gonzalez*, *supra*. See, also, *In re Carey*, 372 Mich 378; 126 NW2d 727 (1964), and *In re Bloom*, 53 Mich 597; 19 NW 200 (1884). This rule of construction is based on Justice Cooley's opinion in *Bloom* that "we think a sentence to confinement to take effect in the future cannot be sustained, unless it is certain and definite, and not subject to undefined and uncertain contingencies." *Id*., at 598.

Here, the trial court relied upon MCL 768.7a(1), which provides in part:

> A person who is incarcerated in a penal or reformatory institution in this state, . . . and who commits a *crime* during that incarceration . . . which is punishable by imprisonment in a penal or reformatory institution in this state shall, upon conviction of that crime, be sentenced as provided by law. The term of imprisonment imposed for the crime shall begin to run at the expiration of the *term or terms of imprisonment* which the person *is serving or has become liable to serve* in a penal or reformatory institution in this state. [Emphasis added.]

Defendant correctly concedes that this statute is applicable to his contempt sentences. He was incarcerated in a penal or reformatory institution in this state following his conviction by the jury of assault with intent to commit great bodily harm and the trial court's cancellation of his bond. Further, the Code of Criminal Procedure defines "crime" to include "an act or omission forbidden by law which is not designated as a civil infraction, and which is punishable upon conviction by any 1 or more of the following: (a) Imprisonment [or] (b) Fine not designated a civil fine." MCL 750.5. Accordingly, one who has been found guilty of contempt of court has committed a "crime" because courts in Michigan have an inherent and statutory power to punish contempt of court by fine or imprisonment. *In re Dudzinski Contempt*, 257 Mich App 96; 667 NW2d 68 (2003); *In re Contempt of Robertson*, 209 Mich App 433, 436; 531 NW2d 763 (1995). Moreover, criminal contempt is a "crime" in the ordinary sense of the word. *People v Joseph*, 384 Mich App 24, 33; 179 NW2d 383 (1971), citing *Bloom v Illinois*, 391 US 194, 201; 88 S Ct 1444; 20 L Ed 2d 522 (1968).

The clear and unambiguous language of MCL 768.7a(1) requires that each of defendant's sentences for contempt not only be consecutive to the term of imprisonment being served at the time the contemptuous conduct occurred but also be consecutive to "terms of imprisonment which the person . . . has become liable to serve." Because as each instance of contempt of court occurred, the trial court properly and immediately found defendant guilty of contempt, MCL 600.1711(1); *In re Contempt of Robertson*, *supra* at 437-438, defendant "has become liable to serve" a term of imprisonment for that contempt of court. Thus, as the trial court found defendant guilty of each succeeding contempt as it occurred, defendant was liable to serve his prior contempt sentences. Accordingly, each contempt sentence is required to be served consecutively to those prior contempt sentences for which defendant had already become liable to serve. To the extent construction of the statute is necessary, our view of the statute is supported because it furthers the intent and purpose of the statute as applied here to deter the

continuing commission of contempt of court by removing the security of concurrent sentencing. MCL 760.2; *Phillips, supra* at 499.

We affirm.

/s/ Peter D. O'Connell
/s/ Jane E. Markey

I concur in result only.

/s/ Michael J. Talbot